Supreme Court, U.S.
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No. 97-876

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

DONALD R. BIRGEL
Petitioner

v.

BOARD OF COMMISSIONERS OF
BUTLER COUNTY, OHIO
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

IN DECIDING THIS CASE THE SIXTH CIRCUIT HAS APPLIED THE LAW OF THE CASE DOCTRINE IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND CONFUSES THAT DOCTRINE WITH RES JUDICATA.

A. LAW OF THE CASE

Respondent's argument that the Sixth Circuit correctly applied *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940) is unconvincing. Indeed, Judge Contie, in his concurring opinion underscored the uncertain basis for the majority's decision at page 952:

> "I am of the opinion that the majority does not directly reference whether it relies on the law of the case doctrine, res judicata, collateral estoppel, or some other jurisdictional doctrine derived from *Stoner v. New York Life Insurance Co.* and *Erie Railroad Co. v. Tompkins* to dismiss this action, I write separately."

Respondent also cites *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940) but neither *Stoner* nor *West* relied upon the law of the case doctrine. Both cases merely applied *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Morover, neither *Stoner* nor *West* held that a federal court is precluded from examining the state court decision and making the necessary determination that the state court decision does in fact correctly express state law. The Sixth Circuit in the present case simply refused to make that inquiry and in fact violated *Erie*, imposing its own concepts of res judicata which are at complete variance from Ohio law.

Respondent's attempt to distinguish *Society of Separationists Inc. v. Herman*, 939 F.2d 1207 (5th Cir. 1991) simply ignores part of the holding. As quoted in the Petition for Writ of Certiorari, this case distinctly held that the law of the case doctrine does not apply between separate cases.

While respondent correctly describes the holding in *Harbor*

Insurance Co. v. Essman, 918 F.2d 734 (8th Cir. 1990), this description of the case hardly distinguishes it. In a prior action between the parties the trial court had overruled a motion to dismiss, holding that the complaint did state a cause of action. The case was later dismissed without prejudice. In the later case the trial court granted a motion to dismiss, finding that the complaint did not state a cause of action. In affirming, the Court of Appeals held as follows:

> "Because the instant case is not the same case as the "Harbor Insurance action", the law of the case doctrine does not apply. Furthermore, even if the doctrine did apply it would not foreclose the court from correcting its errors."

Respondent's description of *Rekhi v. Wildwood Industries Inc.*, 61 F. 3d 1313 (7th Cir. 1995) is simply an attempt to draw attention away from the actual holding of the case. Petitioner cited this case on the law of the case issue rather than *res judicata*. However,the Seventh Circuit held that the prior state court action was not res judicata because it was dismissed without prejudice:

> "The ruling was not actually final, because it remanded the case, and hence is not a final judgment on the merits, which under Illinois law it had to be in order to be res judicata."

The court did go on to suggest that the prior state court ruling might be a basis for collateral estoppel even though not final. However, the court found no Illinois law on the question and also found that the plaintiff had waived the defense. The significant part of the holding is the fact that the court refused to consider the prior state court ruling as law of the case because it was made in a separate action:

> "We have two law suits here - the suit in the Illinois state court system and the suit in the federal court system. *Rekhi* wants to use the ruling of the first suit to preclude relitigation of an issue in the second. The doctrine that limits the relitigation of an issue in a subsequent suit, as

opposed to a subsequent stage of the same suit, is collateral estoppel, not law of the case."

Respondent is correct that *King v. Order of Travelers*, 333 U.S. 153 (1948) is an application of the *Erie* doctrine. However, respondent's argument misses the point. The point is that in applying *Erie*, a federal court need not recognize a non-binding precedent as a correct statement of the state law.

Respondent states that "the decision of the state court of appeals is the best evidence available of what the law of Ohio is on whether a contract existed between the parties." The cryptic statement of the Ohio Court of Appeals is not the "best evidence" of Ohio law. It is not even evidence since it contains no citation of authority, no reasoning and no analysis of the question. No federal court is required to rely on that statement either under the doctrine of law of the case or in applying *Erie*. To do so is actually a violation of the *Erie* rule.

B. RES JUDICATA

Respondent correctly explains that the doctrine of res judicata includes two concepts: claim preclusion, which bars relitigation of the same cause of action between the same parties and issue preclusion, also called collateral estoppel, which forecloses relitigation in a different case of an issue that has been actually and necessarily litigated and determined. This is horn book law which petitioner does not question. However, the explanation neither supports respondent's argument nor justifies the decision of the Sixth Circuit below.

In the opinion below, 125 F.3d 948, 951, the court attempted to state a basis for its reliance on collateral estoppel:

"Ordinarily, res judicata and collateral estoppel both require a final judgment which was not present in *Stoner* and is technically not present in the current action. Our court, however, has applied collateral estoppel even where a final judgment has not been entered. [citing *Employees Own Federal Credit Union v. City of Defiance*, 752 F2d

243, 6th Cir. 1985]."

Neither respondent nor the court below cited any Ohio law in support of the proposition that collateral estoppel may be based upon anything less than a final judgment. In fact, that is not the law in Ohio. The Supreme Court of Ohio held in *Hicks v. DeLa Cruz*, 52 Ohio St.2d 71 (1977) that:

> "The modern view of res judicata embraces the doctrine of collateral estoppel, which basically states that if an issue of fact or law actually is litigated and determined by a *valid and final judgment*, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (*emphasis added*)

There is simply no question that there does not exist a "final judgment" which bars litigation of the present action. A dismissal "without prejudice" under Ohio Rule of Civil Procedure 41(A)(1)(a) is by its very terms not a "final judgment". Neither the respondent nor the Sixth Circuit below address this point and it is an insurmountable hurdle for respondent's position. There is absolutely no authority for the proposition that a prior dismissal without prejudice may operate as collateral estoppel. The holding of the Sixth Circuit violates not only the *Erie* doctrine but this court's holding in *Migra v. Warren City School District*, 465 U.S. 75, 104 S.Ct. 892 (1984). This court many years ago held in *Union & Planters Bank v. Memphis*, 189 U.S. 71 (1903):

> "As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the Courts of the United States can accord it no greater efficacy."

The judgment in the state court action involved in the present case likewise has no force or effect in the Ohio state courts. After a voluntary dismissal under Rule 41(A)(1)(a), an action is treated as if it had never been commenced. *Zimmie v. Zimmie*, 11 Ohio St.3d 94 (1984).

There is another fatal flaw in respondent's argument and in the holding of the Sixth Circuit below. The Ohio Supreme

Court held in *Moherman v. Nichols*, 140 Ohio St. 450 (1942) that:

> "The dismissal of a defendant from an action without a judgment in his favor upon the merits does not protect him from a further assertion of the same claim against him or support a plea of res judicata...."

Unquestionably, respondent does not hold a judgment in its favor. The judgment of the state court of appeals upon which it places great reliance was certainly not in respondent's favor since it reversed the trial court judgment. Moreover, it is not a final judgment and the subsequent dismissal without prejudice can hardly be termed a judgment in respondent's favor.

C. THE DECISIONS OF THE VARIOUS CIRCUITS ARE IN HOPELESS CONFLICT

Respondent limits its "no conflict" argument to *Winchester Homes, Inc. v. Osmose Wood Preserving Inc.*, 37 F.3d 1053 (4th Cir. 1994) and *Gilbert v. Braniff International Corp.*, 579 F.2d 411 (7th Cir. 1978) and totally ignores the cases discussed under the topic of law of the case. All of the cases which petitioner has cited under the topic of law of the case are in direct conflict with the Sixth Circuit holding below in that those cases all hold that law of the case does not apply between entirely separate actions.

Respondent's attempt to distinguish *Winchester* relies upon a distorted description of the proceedings in the state court. Respondent continues to rely upon the Ohio trial court judgment even though it was completely reversed by the Ohio court of appeals and is of no force and effect whatsoever. The statement that the court of appeals "affirmed" the trial court's conclusion is simply not true. Petitioner's only assignment of error in the Ohio court of appeals was sustained and petitioner's dismissal without prejudice placed the case in exactly the same posture as the case in *Winchester*.

Respondent's attempt to distinguish *Gilbert* also relies upon the Ohio trial court decision which it points out was journalized. Of course, it was also reversed. The only factual distinction in the *Gilbert* case certainly does not support respondent's argument. In *Gilbert* the plaintiff did nothing following the trial court's order dismissing with right to amend, and the action remained pending. By contrast, in the present case, Birgel dismissed the case without prejudice, in accordance with his absolute right, thereby placing the case in the posture of one which had never been filed.

CONCLUSION

The Sixth Circuit has applied the law of the case doctrine to prior state court rulings in a fashion which directly conflicts with the holdings of virtually every other circuit. We have been unable to find a decision from another circuit which applies the law of the case doctrine in this fashion. A federal district court has an obligation to apply the dictates of *Erie Railroad Co. v. Tompkins* (supra) irrespective of any prior state court proceedings. The holding in the case below and the holding of the Sixth Circuit in *Employees Own Federal Credit Union v. City of Defiance,* (supra) bars a district court in the Sixth Circuit from even examining the question of whether a prior state court holding comports with state law. The decision below and the decision in *Employees* has created res judicata principles which are peculiar to the Sixth Circuit and at variance with Ohio law. While the Sixth Circuit acknowledges its responsibility under *Migra v. Warren City School District* (supra), the decision below blatantly violates this court's holding.

There is no consistency in the decisions of the circuits regarding the application of the doctrines of law of the case and res judicata to prior state court rulings and a definitive decision of this court is essential for the guidance of all of the lower federal courts in future diversity actions. This court should therefore grant the writ of certiorari.

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